United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4021

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS & DISTRIBUTORS, NO. 75-4021
WARNER BROS., ET AL., NO. 75-4024
SANDY FRANK PROGRAM SALES, INC., NO. 75-4025
WESTINGHOUSE BROADCASTING COMPANY, INC., NO. 75-4026
CBS INC., NO. 75-4036

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC.,
NATIONAL BROADCASTING COMPANY, INC.,
WARNER BROS., INC.,
WESTINGHOUSE BROADCASTING COMPANY, INC.,

Intervenors.

ON PETITIONS FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER SANDY FRANK PROGRAM SALES, INC.

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March 3, 1975

7A

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

Sandy Frank Program Sales, Inc. (Frank) wishes to respond to the Brief of Petitioners Warner Bros. et al. (Warner) because it misstates the record--and thereby seeks to influence the outcome of this proceeding in an improper direction.

Frank does not disagree with much of the legal argument under Point II, which is addressed to the invalidity of the

exemptions grafted onto PTAR I[1] in favor of children's, documentary, and public affairs programming. We do disagree with its characterization of parts of the PTAR III decision at pp. 26 to 31.[2] We also object to its effort (Point III) to extend the argument to the bans on off-network programs and feature films. The latter are not accomplished by the impermissible device of narrow exemptions, but are achieved simply by virtue of the basic exclusion from access time of anything other than local programming or new syndication programs never carried by a network. Off-network reruns and feature films are therefore in a completely different category and do not come within the argument based on the impropriety of the Commission's establishment of favored program categories.

Our principal objection is to Points I and IV, in

1/ For brevity's sake, we will refer to the three Commission decisions dealing with the Prime Time Access Rule--and the form of the Rule adopted in each--as follows:

PTAR I refers to Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, 23 FCC2d 382 (1970), modified on reconsideration, 25 FCC2d 318 (1970).

PTAR II refers to Consideration of the Operation of, and Possible Changes in, the "Prime Time Access Rule," Section 73.658(k) of the Commission's Rules, 44 FCC2d 1081 (1974), reconsideration denied, 46 FCC2d 1013 (1974).

PTAR III refers to Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, §73.658(k) of the Commission's Rules, FCC 75-67, released January 17, 1975, 40 F.R. 4001. This is the order under review.

2/ Thus it refers to "Preferred Game Shows" at p. 27 when it is clear that the Commission does not like such programs, although it does permit their broadcast in access time.

which Warner seriously distorts the purposes of PTAR I, and then tries to argue that--measured against the improper objective it sets up--the Rule has failed and should be abandoned. This is completely in error.

It should also be noted that while Warner states (p. 6) that "Frank produces two game shows", the truth is a little more complex than that--which doesn't trouble Warner here any more than in other parts of its Brief. Frank is not a producer but is, instead, a distributor or syndicator of programs to local stations. In some cases it acquires rights to existing programs--in others, it cooperates with those planning to produce new programs, assisting them with the early stages of the project and undertaking to handle the distribution of the final product. It was in business for over ten years before PTAR I was adopted, and during that time has distributed a variety of programs--travel programs, outdoor adventure programs, game shows, off-network reruns, cartoons and other programs. Last season it distributed the two game shows to which Warner refers. It makes no apologies for its involvement with game programs. They are much more varied than Warner--and the Commission--recognize, and do not involve the sex and violence to which so many people object in the network programming produced by Warner and its allies. See Frank's Reply Comments, October 10, 1974, pp. 30-38. Be that as it may, Frank is involved for the upcoming 1975-1976 television season with two entirely new, non-game programs, which

are of network quality and involve budgets a good deal higher than many access programs. One is a variety program featuring the popular young entertainer, Bobby Vinton, to be produced by Allan Blye and Chris Beard, who have been nominated for more than 25 Emmy awards and were responsible for the original Smothers Brothers Show, the Andy Williams Show, the Sonny and Cher Show, and the Glen Campbell Summer Show. The other--which may have to be deferred because of the Court's denial of a stay--is a non-violent Western for family viewing, "Butterfield and Wells Fargo", starring Dale Robertson (perhaps the most important actor involved in access programming) and to be produced by a company with an outstanding record with this kind of programming.

Frank has thus added to the diversity of sources involved in the production/distribution of programming for access time--and is involved in an endeavor to add diversity of programming as well.

I. Point I Of The Brief Of Warner Bros., et al. Is Based Largely On Distortions Of The Record And Should Be Disregarded.

While carefully avoiding actual misquotation of the record (or, indeed, any direct quotation at all), Warner quite blatantly seeks to create the impression--as the basis for its argument against the Rule itself as distinguished from the exceptions engrafted on it by PTAR III--that the Commission's principal purpose in the original enactment of

PTAR I was to impose a predetermined program diversity on television and to improve the quality of television programs. Such was not the case. The record of the original proceeding leading to the adoption of the Rule makes it obvious that the interpretation Warner seeks to impose upon PTAR I is completely wrong and misleading.[3/]

A. Warner's Distortions of PTAR I

Typical of these purposefully misleading statements are the following:

> (1) "Although originally passed in 1970 to increase diversity of programming, the FCC itself concedes that it has decreased diversity." (Brief, p. 3)
>
> (2) "But now the FCC admits that PTAR has caused a decrease in diversity of program choices for millions of Americans for four years." (Brief, p. 12)
>
> (3) "However, [the Court] was willing to allow the FCC's test. . .in light of the Commission's forecasts that the overall diversity of programs for the public would be enhanced. The FCC had repeatedly predicted that this would take place (23 FCC2d 382, 396-397, 400; 25 FCC2d 318, 325-26)." (Brief, p. 13)
>
> (4) "But, contrary to its original hopes in 1970, the FCC last year candidly admitted before this Court in the NAITPD case that PTAR had created 'the present reality of deteriorating diversity in programming' and that 'the disappointing fact is that this [PTAR] has not resulted in diversity of program choices to the public'.*
>
> ---
>
> * FCC Brief, April 1, 1974, at 18, 25."[4/] (Brief, p. 14)

3/ PTAR I, 23 FCC2d 382, 394-397, 400. See quotations and discussions below.

4/ The FCC did not admit this--its counsel wrote it in a brief. It is well established that counsel for an agency cannot add (footnote cont.)

(5) "The FCC passed PTAR to promote diversity. This Court upheld it on the basis of the FCC's predictions of diversity. Last year, the FCC told this Court the rule decreased diversity. The Commission cannot now

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4/ (footnote cont.) to, or detract from, what the agency itself has done formally in its decisions and orders. The Commission was recently faced, in a totally different context, with a claim that it was bound by what its General Counsel had said in a brief filed in defense of another Commission order. The agency disposed of this as follows:

> "Bell argues in this proceeding that the Commission's brief in the Ninth Circuit in Washington Utilities and Transportation Commission v. FCC, No. 71-2919 (argued February 15, 1973), took the position that 'only local loops to the premises of the specialized carriers' customers were contemplated in Docket No. 18920.' (Bell Br. at 20.) In that case, which is on review of the Commission's Specialized Common Carrier Services decision, the Commission's brief did contain language which suggests that local loop service to a customer's premises was at issue there. Such a suggestion does not take fully adequate account of the reach of our decision. The Commission's brief did not address the interconnection issue directly, however, because that issue was not raised in the petitions for review. We hereby instruct our counsel to forward a copy of this order to the Ninth Circuit to dispel any ambiguities that brief may have created." (Bell System Tariff Offerings, 46 FCC2d 413, at 425, Note 14, 1974).

Since then the Ninth Circuit has affirmed the Commission's decision there in question in a decision issued January 20, 1975. The Commission, in PTAR III, recognizes that "a body of new syndicated programming, which independent stations may use as well as affiliated stations" has, in fact, developed. (Par. 16--40 F.R. at 4003). The statements Warner quotes from counsel's brief in the NAITPD case simply represented an excess of zeal in arguing his side of the case--for a Commission far different from the one which had adopted PTAR I. Unfortunately, in the process he did not properly reflect the true character of the Commission's PTAR decision--as is pointed out in detail at pp. 8-18 below. In contrast to the analysis there, counsel's brief referred to diversity of sources only once (p. 4) and then complained of the Rule's failure to produce program diversity some nine times. The most serious lapse occurs on p. 16, where the following appears:

> "It was the Commission's hope when it adopted the rule in 1970, 'that diversity of program ideas [would] be encouraged by removing the three network funnel for this half hour of programming.' 23 FCC2d at 395. By giving producers the opportunity to develop 'their full economic and creative potential,' the Commission was attempting to serve 'the public (footnote cont.)

profess its inability to gauge diversity. If it cannot measure diversity, it should not have passed the rule in the first place." (Brief, p. 20). [While this does not use the words "program" or "programming" in connection with its references to diversity, it is clear from the immediately preceding material that Warner is again claiming that the Commission adopted PTAR I in order to promote program diversity.]

(6) "Having promised in 1970 to take immediate remedial action if the experimental PTAR did not produce diversity (23 FCC2d 382, 396-97, 401), the FCC cannot now claim legitimacy in the light of PTAR's four-year record." (Brief, p. 21). [The note to the preceding quotation applies to this one also.]

(7) "The FCC now also suggests that perhaps diversity of choices for millions of American viewers may not be all that important after all. It thus rationalizes that alternate sources of programs was the major objective of PTAR, whereas 'diversity of programs was a hope, rather than one of the primary objectives' (¶14)." (Brief, p. 21).

There are many more instances of this sort of thing throughout

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4/ (footnote cont.)

interest in diverse broadcast service,' 23 FCC2d at 397, recognizing that 'diversity of programs. . .are essential to the broadcast licensee's discharge of his duty as trustee for the public in the operation of his channel.' 23 FCC2d at 400."

This clearly emphasized the concept of program diversity by presenting, we believe, every reference to it in the 1970 PTAR I order. But where counsel substituted "would" in the first sentence quoted, the Commission's full statement read: "It may also be hoped that diversity of program ideas may be encouraged. . .". That was certainly not a directive or prediction but a quite incidental hope. And when the missing material is restored to counsel's last internal quotation, it reads: "Diversity of programs and development of diverse and antagonistic sources of program service are essential. . .". So the brief not only overlooked other statements in the order which indicated that the objective of the Rule was the creation of diverse sources of programming, but actually deletes such a statement from material it quotes to show another, but clearly incidental, interest.

All of this was done in support of PTAR II--which the Commission has now abandoned--to turn back to PTAR I. Par. 13, PTAR III order.

the Warner Brief, but the instances cited are enough to place the Brief in its true light as a calculated effort to mislead without direct misstatement.

B. What the Commission Really Said in PTAR I

There is no excuse for Warner's repeated misstating of the Commission's overall purpose in enacting PTAR I. That purpose and intent was clearly and repeatedly set forth, both before and at the time of the enactment of the Rule. It was to reduce the unduly high level of concentration of control of television in the three national networks--in a manner and to an extent destructive of the public interest which the Commission is bound to preserve under the Communications Act (47 U.S.C. Section 151 et seq.)[5/]--that the Commission acted. And the means it adopted was an effort to create an opportunity for the development of additional sources of programming, outside the network system, by carving out an hour of evening prime time free of network programs, off-network reruns, and feature films. It was thus diversity of sources the Commission was trying to achieve. After a ten-year consideration of the subject, in hearings and an extensive inquiry, the FCC made the following pertinent statements (All emphasis added).

In order to clarify the Commission's true intent as much as possible, we have placed symbols in the left-hand

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5/ See, also, Report and Statement of Policy Re: Commission en Banc Programming Inquiry, 44 FCC 2303, 20 P & F Radio Reg. 1901 (1960).

margin which point to passages which are relevant to this issue. These symbols are used as follows:

* - identifies a reference to increased sources of programming, variously described as "competitive", "independent", "needed", "diverse", "alternate", "nonnetwork", etc.

** - identifies a reference to increased opportunity for independent producers and programs.

*** - identifies a reference to the problem of concentration of control of programming by the networks which led the Commission to adopt the Rule in order to develop other, diverse sources of prime time programming. (There are, of course, many other references to the problem of concentration of control of prime time programming in the networks throughout the entire order. We have simply marked the few that occur in the portions we have quoted because they deal directly with the Commission's purpose of broadening the sources of prime time programming.)

\# - identifies a reference to diversity of programs or program ideas.

(1) 1. On March 22, 1965, the Commission issued a notice of proposed rulemaking, flowing largely from an earlier program inquiry, in which we proposed rules intended to
* multiply competitive sources of television programming by (1) eliminating networks from domestic syndication and from the foreign syndication of independently (nonnetwork) produced programs; (2) prohibiting networks from acquiring additional rights in programs independently produced and licensed for network showing; and (3) limiting to approximately 50 percent (with certain programs exempted) the amount of network prime time programming in which networks could have interests beyond the right to network exhibitions. The notice of rulemaking sets forth in detail the conditions of
*** increasing network control of programs and subsidiary rights in programs which led to its adoption. (23 FCC2d 382--footnotes deleted)

(2) . . . Both our original proposal limiting network produced programs to 50 percent of the evening network schedule and the Westinghouse proposal were designed
*** to restrain network domination of nighttime television
** and to open access to the valuable nighttime hours to independent producers. . . . (23 FCC2d 384)

(3) 21. The data before us indicate an unhealthy situation
*** in several respects. Only three organizations control access to the crucial prime time evening television schedule. In the top 50 markets, which are the essential base for independent producers to market programs outside the network process, they are at such a serious disadvantage that prime time first run syndicated programming has virtually disappeared. Such programming is the key to a healthy syndication industry because it is designed for the time of day when the available audience is by far the greatest. . . .to the extent that close network supervision of so much of the Nation's programming centralizes creative control, it tends to work against the diversity of approach
** which would result from a more independent position of producers developing programs in both network and syndication markets. . . .

*** 22. The public interest requires limitation on network control and an increase in the opportunity for development of
* truly independent sources of prime time programming. Existing practices and structure combined have centralized
* control and virtually eliminated needed sources of mass appeal programs competitive with network offerings in prime time. . . . (23 FCC2d 394--footnote omitted)

(4) 23. We believe this modest action will provide a healthy
* impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and, indeed, affiliated) stations. The entire development of UHF should be benefited. It
# may also be hoped that diversity of program ideas may be encouraged by removing the three-network funnel for the half hour of programing. In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered "anticompetitive" where the market
*** is being opened through a limitation upon supply by three dominant companies. . . . (23 FCC2d 395--footnote omitted)

(5) The record herein demonstrates that our elimination of option time has not operated to make more time available
* to nonnetwork programs and to multiply competitive program sources. We therefore take the present action, in line with the above-described continuing program. . . . (23 FCC2d 396--footnote omitted)

(6) 25. However, it is not of course our intention as suggested in the network comments to carve out a competition free haven for syndicators or to give them option time in
* reverse. Equally the public interest in fostering the feasible maximum of diverse program sources does not permit us to preserve the noncompetitive enclave now occupied in prime time by the television networks. Our

objective is to provide opportunity--now lacking in
* television--for the competitive development of alternate sources of television programs so that television licensees can exercise something more than a nominal choice in selecting the programs which they present to the television audiences in their communities. Under the rules we are adopting no television licensee can be required to carry a syndicated program if he chooses not to do so. He may rely on his own program ingenuity or use locally originated programs to fill out his schedule.

26. We believe that substantial benefit to the public interest in television broadcast service will flow from
** opening up evening time so that producers may have the opportunity to develop their full economic and creative potential under better competitive conditions than are now available to them. We emphasize again that it is not our objective or intention to smooth the path for existing syndicators or promote the production of any particular type of program--whether or not it be included within the present category of quality high cost programs. The types and cost levels of programs which will develop from opening up evening time must be the result of the competition which will develop among present and potential producers seeking to sell programs to television broadcasters and advertisers. As his responsibility requires,
* the licensee will decide which among available sources of programs he will patronize. A principal purpose of our prime time access rule is to make available an hour of top-rated evening time for competition among present and
* potential nonnetwork program sources seeking the custom and favor of broadcasters and advertisers so that the public interest in diverse broadcast service may be served. (23 FCC2d 397)

(7) 36. While we have not moved to limit network economic and creative control of the programs in their schedules, we are convinced that American commerce and industry will support greater diversity of programs and program sources than presently are represented in network schedules. Our reasons for so concluding and some suggestions from the record of the program inquiry and elsewhere as to how this can be achieved within the present structure and commercial patterns of television network broadcasting are included in appendix II.

37. Diversity of programs and development of diverse and
* antagonistic sources of program service are essential to the broadcast licensee's discharge of his duty as trustee for the public in the operation of his channel. We note that the degree of network control of their evening schedules has been steadily increasing; indeed there has

been a substantial increase since we issued our notice in 1965. This tendency should be reversed and the networks should take the lead in encouraging the inclusion of the feasible maximum of independently controlled and independently provided programs in their schedules. In this way we may more nearly achieve the goal described by Judge Learned Hand in 1942, and echoed by Justice White in 1969, of a television broadcast structure which is served "by the widest practicable variety" of choice of programs available for broadcasting; that system which will most stimulate and liberate those who create and produce television programs and those who purvey them to the public. (23 FCC2d 400)

** (8) I do not believe the Chairman is correct in saying that if the majority were satisfied with the present network product, we would not think this rule necessary. Our discussions have not turned on the quality of programming--which is a most difficult concept to deal with--but rather on the concentrated nature of the market. Even if I believed network programing to be uniformly of good quality, I would still find the state of the television program market intolerably restricted. It is just not desirable to have a situation in which one who desires to produce and sell programing has only three potential buyers. It is that condition we seek to modify slightly. I have no illusions that, in the process, we are going to get better programming. I recognize that the economic motives of the local affiliates are the same as those of the networks. I simply hope that we will get somewhat more varied programing, with more people involved in the creative process, and without forcing everything through the network funnel. (23 FCC2d 418--concurring opinion of Commissioner Cox)

(9) The Chairman then discusses whether the new rule will result in diversity of programing--though I have already pointed out that we do not claim that it will, buy only that it will open the market to more producers. It would be fine if some of those thus given access to the most lucrative time on television would immediately generate significantly different programing. But if these new producers simply turn out more of the same, the public will at least be getting "more games, more light entertainment along proven formulas, more 'emcee' talk shows" from more different sources and without everything having been homogenized to fit the tastes of only three small groups of people. If this results in the development of a healthy syndication industry, it seems to me that we will have somewhat increased the chances that new program concepts will be attempted. Certainly continuation of the present system would guarantee more of the same, so we are losing

nothing by making that effort to increase competition. (23 FCC2d 419--concurring opinion of Commissioner Cox.[6/]

The first two groups of statements we have emphasized, marked by an * or **, clearly reflect the Commission's purpose and intention to increase the diversity of program sources, either using that term or references to increased opportunity for independent producers or programs.[7/] There are fourteen such references to increases in sources, producers, and programs, without any connotation of improved diversity in the programs themselves. The last category, marked by a #, does

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6/ At p. 22, Warner refers to the attempt of Commissioner Robinson, in his dissent at p. 17, note 2, to rebut this--and, without saying so, all the references to diversity of sources quoted above from the Commission's decision. Commissioner Robinson argues that it makes no sense only to promote more program sources, without also undertaking to promote diversity in programming. This totally disregards the fact--so clearly pointed out by this Court in Mt. Mansfield--that the Commission has a duty to promote competing program sources so that licensees can effectively choose those which best serve their communities, but that to try to tell stations what to carry and what not to carry trenches on the First Amendment. He ignores this problem, though elsewhere in his dissent he seems to recognize to some degree that Commission action in that area is dangerous. The truth is that the Commission went as far as it could in 1970 by seeking to promote diversity of sources--with the incidental and subordinate "hope" that such varied sources might produce varied programs. That, as it said, must be left to the marketplace.

7/ The references to network dominance--typical of many others elsewhere in the PTAR I order--are also clear evidence of concern for expanding sources of programming rather than increasing the diversity of programs. The entire analysis underlying adoption of the Rule turns on the problems of concentration in the market for prime time programming, the undesirability of a situation in which producers could sell to only three buyers, and the dangers of having all national programming filtered through just three small groups of network executives. The decision contained no criticism of lack of quality or diversity in the programs the networks chose. The Rule was not designed to raise quality, or increase diversity, in television programs, but only to open up the market to more producers--i.e., more program sources. Any improvement in program quality would simply be a beneficial side-effect of the Rule.

include references to diversity of programs or program ideas--there are two of these.[8/] Thus it is clear that the Commission's primary interest was in increasing the opportunities for programming from diverse sources, and that any notion of enhanced diversity of programs was purely incidental to that fundamental purpose. (Thus, the reference in Par. 23, the fourth quotation above, says "[i]t may also be hoped that diversity of program ideas may be encouraged. . ." and the same thought is expressed in the seventh quotation, from the concurring opinion.)

Furthermore, the Commission clearly disavowed any effort to improve program quality or effect the production and broadcast of any particular types of programs. In Par. 26 (included in the sixth quotation above) it said:

> . . . We emphasize again that it is not our objective or intention to smooth the path for existing syndicators or promote the production of any particular type of program--whether or not it be included within the present category of quality high cost programs. The types and cost levels of programs which develop from opening up evening time must be the result of the competition which will develop among present and potential producers seeking to sell programs to television broadcasters and advertisers. (23 FCC2d 397--Emphasis added)

The Commission thus made clear that it was not trying to dictate program types or determine the content of stations'

8/ The last sentence in Par. 26, the sixth quotation above, refers to "the public interest in a diverse broadcast service". That can be read, by itself, as meaning a diverse, broadly based broadcast service with many producing sources, or as referring to the program service which results. However, a reading of the whole sentence makes it clear that the "principal purpose" is to develop "competition among. . .nonnetwork program sources."

program schedules--a sound position which the current Commission has unfortunately abandoned by seeking to exercise impermissible control over programming by means of the selective exemptions which PTAR III engrafts on PTAR I, an action which all Petitioners now before the Court are attacking.[9/]

This Court, in its opinion in Mt. Mansfield Television, Inc., 442 F.2d 470 (1971), quoted the above language from PTAR I in support of its conclusion that ". . . the prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts . . ." (442 F.2d at 477). It thus sets forth the two sentences quoted above in support of its statement:

> The legislative history cited by petitioners does not alter our conclusion that the Commission was acting well within its statutory powers in adopting the prime time access rule. The burden of the cited legislative history is that Congress did not want the Federal Communications Commission to become a censoring agency. But the challenged regulations are not an exercise of censorship powers. The Commission has found that the

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9/ To make doubly clear that it was seeking broadly based, diverse sources of programming, and not trying to dictate diversity of programs, the Commission added (in Appendix II, "The Comments Relative to the 50-50 Rule"):

> "As we have repeatedly emphasized, it is not our intention to set up standards of diversity and quality in television programming. What we intend is to encourage conditions of competition for network evening time and programs which will permit the harnessing of the widest diversity of marketing interests of American business which is economically feasible to the network program selection process. The history of television programming indicates that this would result in a greater diversity among individual programs. However, that would be the decision of the marketplace. In our commercial television system program diversity--particularly in entertainment--can be little greater in the longrun than sponsors are willing to support. . . ." (23 FCC2d at 411)

> wide range of choice theoretically available to licensees is either not in fact available or is not being exercised for economic reasons. It has acted in discharge of its statutory duty in seeking to correct that situation. The Commission does not dictate to the networks or the licensees, or the independent producers whom it hopes to stimulate, what they may broadcast or what they may not broadcast; it is merely ordering licensees to give others the opportunity to broadcast.32/ [Text of footnote 32 omitted because quoted above.]

In the last sentence in this paragraph, the Court makes clear that it understood what Warner seeks to obscure--that the 1970 Commission was not trying to dictate programming--either improved quality or increased diversity of types--but was simply ordering licensees to give other sources an opportunity to broadcast.

The Commission, in its PTAR III decision, reaffirms this:

> 14. In evaluating the arguments of the majors and other opponents of the rule, it is important to bear in mind the rule's primary objectives: to lessen network dominance and free a portion of valuable prime time in which licensees of individual stations present programs in light of their own judgments as to what would be most responsive to the needs, interests and tastes of their communities. At the same time, the rule seeks to encourage alternative sources of programs not passing through the three-network funnel so that licensees would have more than a nominal choice of material. These are still valid objectives. It was also noted that this increased supply would be a concomitant benefit to independent stations; and "it may also be hoped that diversity of program ideas may be encouraged by removing the network funnel for this half-hour. . .". Thus, diversity of programming was a hope, rather than one of the primary objectives. It was emphasized that the Commission's intention is not to smooth the path for existing syndicators or encourage the production of any particular type of program; the "type and cost levels of programs which will develop must be

the result of competition which will develop."15/

15/ See the May 1970 Report and Order in Docket 12782, pars. 23, 25-26, 23 FCC2d 382, 395-397. The matter of local programming was also mentioned in a footnote as being in the public interest (23 FCC2d 395, footnote 37).10/

This interpretation by the regulatory agency is obviously more consistent with the record--and entitled to much greater weight--than Warner's blatantly self-serving efforts to obscure the clear intent of the original Rule.

We therefore hope that it is clear, and not subject to further argument, that the principal objective of the Commission in promulgating PTAR I in the first place was to lessen network dominance and revitalize the ability of stations to exercise their program responsibility and, in aid of that objective, to provide opportunity for the competitive development of independent program sources to serve licensee needs.

10/ Warner tries to minimize the fact that the Commission contemplated use of some of access time for local programming as being mentioned "in only a footnote", arguing that this is a new rationale advanced by the Commission as a basis for continuing PTAR I (Brief, p. 56). This ignores the fact that the Commission also said, in Par. 25 of the PTAR I decision: "Under the rules we are adopting no television licensee can be required to carry a syndicated program if he chooses not to do so. He may rely on his own program ingenuity or use locally originated programs to fill out his schedule." And PTAR I's whole emphasis on increased freedom for licensee program judgment obviously recognized the desirability of using some of this valuable evening time to serve local needs. The Commission has found licensees' development of such local programming to be substantial and beneficial (Pars. 15, 32, 60 of PTAR III). Warner tries to argue this may have been due to increased pressure from local groups. But such groups have enjoyed increased success because the Rule makes good evening time available for local program use, since the exclusion of network programs, off-network reruns, and many feature films has made stations more willing to discharge part of their obligation to serve local needs and interests in prime time. This was obviously anticipated as one possibility under the Rule and the record is one of success in this area.

The Commission certainly did not intend to substitute its judgment as to what the public should see and hear on television for that of the licensee, whose responsibility it is, under the statute and the established policies of the Commission, to make programming decisions. We have set this forth in detail in our Comments in this proceeding. See Comments of Sandy Frank Program Sales, Inc., Docket 19622 (Sept. 20, 1974) pp. 8-35.

As shown above, program diversity was not the purpose of the Rule. From the beginning of its ten-year Inquiry (See Frank's Comments, ibid.) the Commission's stated objective was to reestablish its licensees as effective decision-makers in the prime time program selection process and to foster an economic environment for at least an hour of prime time, free from network dictation and control, in which independent producers[11/] could prosper and multiply.

11/ Warner tries (pp. 49-53) to confuse this by suggesting that the rule was designed to improve the lot of the so-called "independent" producers of network programs--the members of intervenor National Committee of Independent Television Producers (NCITP). That was not the case as far as the Access Rule itself was concerned, since these producers already enjoyed a preferred position in the network enclave. The independent producers PTAR I was designed to help were those who function outside the network system in the new program syndication market--and they have been greatly assisted by the Rule. The NCITP members were benefited by the correlative rules barring the networks from acquiring financial interests in programs produced by others or engaging in syndication--and that is what the language quoted by Warner at the top of p. 50 refers to.

C. PTAR I Has Been a Success - It Has Achieved the Objectives for Which It Was Enacted

Equally misleading are the repeated assertions in Warner's Brief that PTAR has been a failure and has not accomplished the purposes for which it was intended. The fact is that, in terms of its real stated purposes, the Rule has been a success--although it has not really had an adequate or fair test. See Frank's Comments, Sept. 20, 1974, p. 28-35; PTAR III Order ¶¶ 15-19, 32, 58, and 60). Under the rule, television licensees are again, to a limited extent, masters of their evening schedules; an adequate supply--indeed, an abundance--of new syndicated programming has flowed from a variety of independent sources, some old, some new; this new programming has been wide accepted by stations, advertisers, and the television audience; the stations have prospered and are originating more local programs. The Department of Justice and 21 of 22 public groups which commented strongly urge retention of PTAR I.

It may be true that the new access programs have not achieved the "cultural level" or the "diversity" which some might think desirable--apparently including the major film companies and their NCITP allies. But then, neither have the programs these favored producers have been supplying to the networks for many years, under conditions much more

favorable than the access producers have enjoyed in the limited time the Rule has been in effect--but always under attack. It is generally agreed by critics--and many creative people who have been involved in television--that the diversity and quality of network programming, which comes so largely from these Hollywood interests who now so vociferously criticize the efforts of others, has slowly but steadily declined since the 1950's. The Commission had a great deal of testimony to this effect before it when it adopted PTAR I in 1970. But as noted above, it did not try to "legislate" higher quality or more diversified programming. In the first place, any such effort would have involved it in violation of the First Amendment--as do the Commission's preferred program exemptions engrafted on PTAR I in PTAR III. In the second place, there is no agreement as to what "quality" and "diversity" mean in this area. And finally, there is really no way the government can decree that creative people shall produce, and broadcasters shall carry, quality and diversified programs. So Warner's self-serving criticism of programs in which it and its friends have no profit stake must be taken with a very large grain of salt. The diversity it says has been reduced wasn't all that diversified in the first place, with dozens of imitations

of every successful show and rising and falling fads in westerns, action-adventure and crime/police programs, plus a wearying procession of situation comedies--many of which didn't last even half a season. There have been some good television programs and program series, but the network record before PTAR I is not nearly as good as Warner tries to suggest--especially in the period 7:30 to 8:00 p.m. E.T., which is the least valuable part of the three and a half hours formerly programmed by the networks.

Furthermore, as suggested above, if there have been shortcomings in access programming that has largely been due to the unfriendly and unstable climate in which PTAR I has been forced to operate. See 1974 Report 44 FCC at p.1137, ¶89. Also Report, January 16, 1975, ¶16, 40 F. R. 4004; FCC 75-67, ¶49b. Enough has occurred, however, in the two unquiet years of its full operation--not four as the Warner Brief suggests[12/]--to demonstrate that its basic objectives have been largely achieved--and to provide reasonable assurance that the broader base for independence which the Commission hoped would evolve for independent producers and station licensees from the operation of PTAR will become a reality.

12/ During the 1971-72 season, the Rule was not fully in effect because the Commission deferred the ban on off-network programs. And the 1974-75 season was badly distorted by the Commission's abortive effort to implement PTAR II.

D. Warner Has Simply Tried to Create a Straw Man

The majors--and to some degree the Commission in its PTAR II Order--have sought to engraft an added program diversity goal to the originally stated purposes of the rule. The Commission in PTAR III has quite properly withdrawn from that position and has reverted to its original statement of purpose for the rule. See above. Having wrongly attributed an attempt at government prescribed diversity as the purpose of the Rule, Warner continues to defame the rule as a failure because this "goal" of diversity has not, in its view, been achieved.[13/] This attempt to reshape the record for its own purposes is transparent--Warner has simply set up a straw man and then tried to demolish it.

13/ PTAR I has, in fact, produced diversity of programming, though not in the sense Warner wants it--since apparently it would only be satisfied by programs produced by itself or its allies. But access period programming includes shows which either have never been on network television or have been dropped because they no longer met the networks' requirements. Thus the Lawrence Welk Show and Hee Haw were dropped by ABC and CBS because they appealed to an older audience, while the networks believe it essential to aim their programs at young people. The continued presentation of these programs in access time is therefore a contribution to program diversity. Similarly, game shows used to be carried in network prime time but have now disappeared--though the networks still carry many of them in the daytime. So those who enjoy game shows and would like to see them in the evening can choose from a more diversified schedule because of PTAR I. Overall the range of choice for the public between 7:00 and 11:00 p.m. E.T. is as great as, and probably greater than, it was before PTAR I was adopted.

As is pointed out above, much is made in the Warner Brief of the fact that here and there the Commission refers to diversity of programs or of program ideas as a desirable goal for television. The reasons for these references are quite apparent and are in no way inconsistent with the Commission's disclaimer of any intent to dictate the composition of television schedules or the "types and cost levels" the programs which PTAR I would engender. A secondary result which the Commission "hoped" would follow--and which to some extent has been achieved--but which it realized would not, indeed should not, be directly brought about by governmental fiat, was the gradual growth of a broader base of program sources. It was hoped that their addition to the roster of program producers, from which the formative influences on new programs come, might, hopefully, yield a more diverse stock of programs.

In this connection it should be remembered that the prime time syndication market had been smothered by network encroachment upon prime time. Under PTAR I, the first task, starting from scratch, was to nurture and develop a prime time program syndication industry. Despite an unfriendly, even hostile, climate at the Commission, such an industry has been created by Frank and other entrepreneurs and has developed with surprising rapidity under very difficult circumstances. Access time periods have been filled with new

syndicated programs in those many instances--clearly the great majority--where television station licensees have, in the exercise of their newly reinvigorated program responsibility, chosen to "go to market" to fill their needs. This is precisely the result which the Commission's long and painstaking effort to cope with the networks' monopolization of prime time programming was designed to achieve. The success of PTAR I was, incidentally, achieved almost entirely without the participation of the majors who, of course, were in the best position to supply well financed programming for access time had they chosen to do so. It ill behooves these disgruntled "competitors" of the successful new entrants into the syndication market to disparage the programming supplied by them for access time when they, the major producers, sat back and attempted to scuttle the Rule and disrupt and frustrate the Commission's public interest purpose to foster an independent syndication market and to enable television licensees, for a small part of prime time at least, to be "masters in their own houses," as is their rightful role.

As indicated above, the Commission did not intend--indeed it specifically disavowed any purpose--to "promote the production of any particular type of program" and clearly stated that program types and cost levels would be left to the market. Yet it is precisely the "types" (allegedly

inferior in quality) and "cost levels" (claimed to be too low) which Warner finds unsatisfactory. Unable to attack the access producers for failure to supply programming which stations, advertisers, and the public have found satisfactory, the majors find themselves in the odd position of seeking to force the Commission to scrap PTAR I on the basis of a qualitative test under which, they say, access programming should be adjudged inferior--to what, and on what basis, is not quite clear. The one thing that is clear is that in Warner's view game shows are taboo, but that off-network programs and old feature films--of which Warner and its associates obviously have a large supply--are the acme of programs and are therefore to be preferred. Warner was successful, to a substantial degree, in moving the Commission in that direction in PTAR II. But now that the Commission is returning--in the first instance, at least--to PTAR I, the majors are again unhappy.

They should, however, take heed of the Commission's statement in para. 20 of its PTAR III Order. After noting Warner's criticisms of access programming, the Commission said the picture was not as bad as Warner claimed and that there is by no means a total lack of diversity. It then pointed out the dangers of Commission evaluation of such matters, and went on to say:

> "Action on a basis like this has the danger of reflecting the Commission's personal predilections and prejudices.

> "A related question is, assuming such an inquiry is appropriate, what standards should be used, and whether they should be applied, in a sense, retroactively and without any public input into their formulation. For example, assuming that 65.6% of access entertainment time devoted to game shows is undesirable, what about 41.2% of network prime time devoted to crime-drama shows of various types? If we look at the concentration of game shows in certain markets such as Cincinnati or Albany, must we not look also at three network crime-drama shows opposite each other on Wednesdays at 10 p.m.?" (40 F.R. 4004).

Unfortunately the Commission forgot this in imposing exemptions for programming it prefers. But it must be clear that if Warner is urging minimum standards of quality for access time, similar standards must be applied to the networks' prime time schedules. Surely Warner is not urging that!

As the Commission predicted, the programming that has developed has been the product of the marketplace. The results of competition in any free market cannot be precisely predicted--especially where, as here, the nature of the product is dictated by highly volatile factors such as public acceptance of television programming. The results thus far, in terms of program types and cost levels of programs, have not been entirely those which individuals interested in improved television service might have hoped for. However, there is little doubt that, given a fair test under stable conditions, the results hoped for by the Commission will flow from the new program industry engendered by PTAR I--and that there is always the chance of improved quality and diversity as the industry becomes more firmly established.[14/]

14/ To give the Court a history of access programming, we are attaching, as Appendix A, pp. 74-78 from Frank's September 20, 1974 Comments.

In essence, Warner has not really argued its stated Point I--The Basic PTAR Rule Violates the First Amendment. Instead it has distorted the Commission's decision adopting PTAR I[15/] to create a straw man which it then attacks, and has similarly distorted the record under the Rule to claim that it has failed in operation. In short, it is not really defending "precious First Amendment rights" (Brief, p. 23) in this portion of its Brief, but is seeking restoration of the unhealthy conditions which the Commission found to exist prior to the Rule--simply because Warner and its allies enjoyed favored status as suppliers of programming to the networks and were therefore the beneficiaries of the latter's undue dominance of prime time programming. Thus Warner, in this section of its Brief, is far more concerned with its own profits than with the preservation of constitutional rights, which actually have flourished in access time under PTAR I. Its arguments under Point I should be disregarded.

15/ It has also distorted the PTAR I decision by claiming that the Commission adopted PTAR I--and this Court approved it in Mt. Mansfield--only as an experiment which was to be terminated at any sign of problems with it. (Brief, pp. 6, 12, 13 and 14). As the Commission's PTAR I Order makes clear in para. 38 (23 FCC 2d at 400-401), its statement that if it found itself mistaken in adopting PTAR I. ". . .we have stated our intention to follow developments and take any remedial action that may be necessary. . ." was elicited by last minute claims (1) that stations in smaller markets would be hurt economically, and (2) that the economics of film production had changed so greatly that independent producers would not be able to generate programming to fill the time vacated by the networks. The record makes it clear that the smaller market stations have enjoyed increased earnings under PTAR I and that the independent producers (continued on next page)

II. Warner's Point III Is An Impermissible Reargument Of This Court's Decision in Mount Mansfield With Respect To The Bans On Off-Network Programs And Motion Pictures

PTAR III does not change in any way the Rule's ban on the carriage of off-network reruns--except to permit, improperly we believe, the carriage of off-network children's, public affairs, and documentary programs because the Commission regards these as categories to be fostered. All of the arguments Warner makes with regard to reruns are, therefore, foreclosed by this Court's ruling in Mt. Mansfield that to permit the use of reruns "would destroy the essential purpose of the rule to open the market to first run syndicated programs." (442 F.2d at 484)

15/ (continued from preceding page) have been more than able to fill the time cleared by the Rule. Similarly, this Court, in Mt. Mansfield, simply referred to these possibilities (442 F.2d at 483) and quoted the Supreme Court's statement, in Red Lion Broadcasting Company, Inc., v. FCC, 395 U.S. 367 (1969), that if the networks' claims that the Commission's fairness doctrine and personal attack rules would restrict broadcast coverage of controversial issues of public importance, there would then "be time enough to consider the constitutional implications." (395 U.S. at 393). That did not mean that the Court "was giving PTAR only conditional approval," as Warner boldly asserts at p. 13, but only that the Court would listen to claims of actual impairment of the First Amendment by PTAR I if and when such consequences actually occurred. And in National Association of Independent Television Producers and Distributors v. FCC, (the NAITPD case), 502 F.2d 249 (1974), this Court again recognized that the rule was experimental--in the sense all legislation is--because its results were not entirely predictable, and that if the Rule, in practice, infringed the First Amendment--rather than fulfilling its fundamental precepts as the Court had found in Mt. Mansfield (442 F.2d at 477)--it could further review the matter. But that does not mean the Court will override the Commission's reaffirmance of PTAR I because of a claimed failure to achieve diversity of programming. And on the First Amendment issue, Warner has made no case that PTAR I has infringed the Constitution--though we agree that PTAR III's addition of exemption of Commission favored programs will. As to PTAR I, Warner is simply trying to reargue--four years later--the constitutional issue this Court laid to rest in Mt. Mansfield.

PTAR III changes PTAR I as to feature film slightly. The latter barred the use, in access time, of any feature film which had been previously broadcast by a station in the market within two years. This Court sustained that ban in the same passage quoted in the preceding paragraph. PTAR III changes this by banning any feature film which has previously been broadcast on a network. That puts feature films on exactly the same footing as any other programming that has previously been carried on a network. Since the need to preserve the full access period from invasion by programs that have previously enjoyed network exposure--and financial support--is still critical, Frank believes that this small change in the rule merely serves to implement more clearly the Commission's purpose to clear access time of all material previously broadcast on the networks. We therefore believe this change is a sound policy adjustment in the rule and is well within the ruling in Mt. Mansfield.

III. Warner's Point IV Distorts The Record As To The Effect Of PTAR I On Network Dominance

Warner recognizes, as did this Court in both the Mt. Mansfield and NAITPD cases, that the Commission has a statutory mandate to decrease network dominance. However, it argues--contrary to the Commission's own conclusion (PTAR III, Par. 23)--that PTAR I has increased the dominance of the networks.

Warner argues essentially that its claim is established because (1) ABC and NBC now support the rule, (2) PTAR I has created a scarcity of network prime time and has thereby increased the networks' leverage over independent producers, stations, and advertisers, and (3) the networks set the tone for access programming by affiliates because of their owned and operated stations' importance to the success of new access programs. The Commission has answered all these arguments--as it did in its PTAR II order, Par. 97--and there are other answers in the record.

ABC has supported PTAR I all along--although it opposed the correlative financial interest and syndication rules. The Rule has helped ABC become fully competitive with CBS and NBC for the first time in history--a result very much in the public interest because it gives us three fully viable networks and enhances competition among them. NBC originally opposed the rule--in part out of self interest and in part because of concern for its smaller affiliates. Since experience shows that all affiliates--including the networks' owned and operated stations--have profited under the rule and have been freer to serve locally ascertained needs and interests, NBC now accepts the rule. CBS still opposes the rule, but has urged caution with regard to overly hasty implementation of changes. None of these positions derives necessarily from any increase in network power--and Warner offers no evidence to support that claim. Interestingly enough, Warner does not object to the one part of

PTAR III which does increase network dominance, namely the return to the networks of one hour on Sunday night for so-called "children's" programming like The Wonderful World of Disney. See Franks's opening brief, pp. 60-64.

As for the alleged scarcity of network prime time, it is a bit odd to argue that PTAR I has failed because it did precisely what it was designed to do. The only practical step the Commission found it could take to curtail network dominance--after ten years of study--was to reduce the network's occupancy of prime time to create opportunity for others. The rule had precisely that effect, so there is now less network prime time than there used to be. Obviously the Commission expected that result--and anticipated that it would slightly tighten up the market for program sales to the networks. However, the number of programs offered the networks has always greatly exceeded the time periods to be filled, so this has always been a buyers' market--as will always be true when there are only three buyers and dozens of potential sellers. PTAR I did not significantly change this alignment, and the problems Warner complains of are due much more directly to other causes, as the Commission indicates. Warner says that PTAR I reduced network option time by 16%. If it and its allies had taken 16% of their programs into the access market they would have found that the time periods in which they could sell had not shrunk but had actually increased. They

can now offer new programs any time between 7:00 and 11:00 p.m., E.T., instead of just 7:30 to 11:00 p.m. when they could sell only to the networks. But they would have to compete with all comers in the access market, as do Frank and the other access producer/syndicators. It is the loss of their protected haven in the greater amount of time the networks used to control that Warner et al are bewailing, not the claimed increase in network dominance they say they are attacking. They never lifted a finger to correct the networks' undue dominance of prime time programming which led to the adoption of PTAR I.

This same answer applies to the claim that the balance between networks and national advertisers has been altered. Of course--the Commission expected it to be. But, again, network television advertising has always been a sellers' market, with just three entities selling a highly limited and valuable stock of network commercial positions to hundreds of potential buyers. Again, the change was not great and was fully anticipated. And this is offset by the fact that access time created new opportunities in prime time for regional and local advertisers who could not afford a network buy. And if national advertisers are jostled out of network time, they can buy national spot advertising on local stations in access time. In short, PTAR I did not shrink the day to less than 24 hours. There is as much time to fill with programs, and as much opportunity

for advertisers--it's just that not so much of it is controlled by the networks. It is hard to contend, as Warner tries, that this reduction in the networks' control over programming and its associated advertising from three and a half hours to three hours per night has actually increased their power.

As for the stations, as the Commission points out there has never been much preemption of network programming by the affiliates. Since PTAR I has given the stations seven hours of prime time a week to program on their own, it may have reduced pressure to occasionally preempt a network show for some matter of greater local interest. But that result gives the stations greater freedom and flexibility without increasing the networks' power in any significant way--since it was never the Commission's purpose to limit clearance for programs the networks were allowed to distribute.

It is true that an access programmer needs clearances in the top ten markets, where the networks' owned and operated stations are located. A sale to one or more such O&O stations is therefore a major step toward success for a new access program. But the Commission finds such sales important but not always necessary--and certainly there is no evidence of prior clearance of program ideas with the networks or of the kind of detailed supervision over the production of access programs which they exercise over programs carried on the network. Again, there is no way that the influence network O&O's may have on the success of

access programs which are typically brought to them at the very start of the selling season can be stretched to equal--and Warner claims exceed--the networks' absolute control over every detail of the programs they choose for their prime time schedules. When an O&O, or five O&O's, buy an access program, it may be carried by 30 to 50 other stations, but when a network buys a program it is almost automatically carried by 120 or more affiliates. The latter is clearly the greater power, and it has been reduced by PTAR I.

Warner joins Commissioner Robinson in arguing that the Commission should abandon PTAR I and "explore direct and viable solutions to the network dominance problem" (Brief, p. 54) which it says have been suggested by Commissioner Robinson, former Commissioner Johnson, former Chairman Burch, and others. But it simply ignores the fact that every one of these proposals has been considered by the Commission--some of them many times--and that they were not adopted for very good and sufficient reasons. This is not the forum to debate them again. But this Court surely will not set aside PTAR I, one of the Commission's most important policy rulings in the last decade, just because one or more Commissioners have made suggestions which did not seem viable to a majority of their colleagues.

IV. Conclusion

Warner's points V and VI are too insubstantial to require direct answer. They depend, essentially, on the distortions of the record which we have discussed above.

Frank therefore respectfully urges the Court (1) to reject Warner's contention that PTAR I should be overturned, and (2) to reverse that part of the Commission's PTAR III order which engrafts the PTAR I exemptions for certain categories of programming favored by the Commission.

Respectfully submitted,

SANDY FRANK PROGRAM SALES, INC.

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/s/ William J. Byrnes
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March 3, 1975

An authoritative publication addressed to advertisers has related the history of access time programming from the point of view of sponsors in the following terms[30/]

> One of the most encouraging things that resulted initially was the great surge of interest by advertisers who saw for the first time since the late fifties, an opportunity to involve themselves with first-run night-time series programming. Almost immediately Lever Brothers offered This Is Your Life, while Campbells sponsored new productions of Lassie, and Chevrolet, Noxell and Coca Cola introduced us to shows like Rollin On The River, Stand Up and Cheer, The Golddiggers, among others. These were followed by Hee Haw and Lawrence Welk which were sold on a "participating" basis, and more ambitiously by Dr. Kildare (Bristol Myers) and Police Surgeon (Colgate) along with a raft of animal and nature shows. And, of course, there were cash programs sold directly to stations, like Monte Nash and Primus.
>
> But the FCC's rule had several key weaknesses in it which have dampened advertiser interest and turned the 7:30-8 p.m. slot into a worse "wasteland" than it ever was when the networks had control.
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> Since 1971, most of the advertiser financed shows have failed to deliver the kinds of audiences their

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30/ Media Decisions, June 1974, p.12-14. The entire article is appended as part of Exhibit L.

APPENDIX A

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> sponsors hoped for and many have been discontinued. Retaining its traditional Sunday time slot with a long list of stations, Wild Kingdom is a glowing exception and Police Surgeon, Survival, and Safari to Adventure have apparently done well enough to be renewed. But most of the others haven't. And many stations have been burned by the dramatic, action and comedy offerings they bought directly from syndicators. In most cases, UFO, Monte Nash, Primus, Dusty's Trail, Starlost, etc. failed to live up to expectations and only Ozzie's Girls seems to have performed about as anticipated.
>
> Game shows are something else. Almost universally successful in a time slot dominated by older adults, they have proliferated as stations chose the easy way, paying relatively low prices for programs that assured them of high and readily salable ratings. During the past season it was estimated that shows like Let's Make A Deal, Hollywood Squares, Concentration, The Dating Game, Price Is Right, Truth or Consequences and many, many more accounted for almost 60% of access time periods on network affiliates. And this coming season's ratio will probably be higher.

One principal problem for advertisers is that because audience circulation in access time is usually lower than in network time, advertisers, to get their money's worth, must select programs that suit their needs either demographically or quantitatively (in terms of audience) and that do so at the cheapest possible price.

76. A typical budget for an access half hour ranges from $30,000 to $60,000 per episode, which entitles the station buyer up to two runs. Frequently an advertiser who purchases a show from a syndicator or producer for barter purposes may pay up to a maximum of $70-75,000 per half-hour episode for all domestic rights. When a show is offered to stations on a barter basis, the sponsor retains the equivalent of 4 thirty-second advertising spots per telecast, while the stations which adhere to the NAB Code keep six for the sale to others. But

the basic problem is clearance because of the large number of shows competing for access time exposure. This clearance problem is compounded by stripping which, as we have said earlier, greatly reduces the number of time slots available for new access time shows. The author of the article concludes that station licensees will take steps to improve opportunities for a wider variety of advertiser-supported programs to gain entry to prime time. "Let's hope," he says in effect, "that the men who run the network O & O's and some of the larger station groups will do something to reverse the trend toward sameness in access time programs before it is too late and this great opportunity (prime time access exhibition) is eventually lost." The problems discussed in the article quoted above quite obviously do not arise because of a lack of programming for access time. They are caused by healthy competition among different kinds of programs for time slots in access time and indicate that the Commission's expectation has been realized that competition in television programming would be rejuvenated.

77. Broadcasting Magazine in a recent careful appraisal of access time programming for the 1974 fall season, detailed the large stock of new, independent syndicated programs available for access time. In discussing the coming season Broadcasting reported 31/

> By now, the contours of prime access are substantially filled in and there is enough detail to

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31/ Broadcasting, July 15, 1974. The Hustle in Syndication That Prime-Time Ruling Set Off The entire article is attached as part of Exhibit L.

> provide an accurate picture. What emerges is no surprise: The programs chosen to adorn the prime-access landscape for next season-the third year of the commissoin's rule-are, not surprisingly, those that have scored well in the marketplace in the other two. Leading the pack: animal shows and game shows.
>
> Conversations with program directors at stations and with their station reps highlight this observation on their selections: They would like to use innovative, quality programming but it's the game, wildlife, adventure and personality programs that attract the audiences. (There is another reason, too, of course: They are cheap. "You don't have to pay residuals to an elephant," as one prominant agency executive put it.)
>
> So stations veered in many instances to the tried-and-proven prime-access shows of previous seasons (Let's Make A Deal, Lawrence Welk, Treasure Hunt, Hollywood Squares, Hee Haw! Wild Kingdom, Survival, Wild,Wild World of Animals). High on their lists are remakes of popular network series (Candid Camera, Name That Tune, $25,000 Pyramid). (Emphasis added.)

78. From these studies it is apparent that the prevalence of game shows stems from a combination of audience demand and licensee economic self-interest--both entirely legitimate and proper considerations in licensee determination of the mix of entertainment programs. While admittedly game shows, animal shows and the like are somewhat less expensive than dramatic shows, the primary reason for their predominance is that these shows, rather than dramatic or other type programs, attract the access time mass audiences. Hence, they qualify as entertainment shows in which "the public is interested"--which is at least one measure of the public interest.

79. Game shows, while popular and therefore prevalent, do not entirely dominate the access time program product for

the coming season. A reasonably wide variety of mass appeal entertainment program types is represented in the top 28 syndicated programs sold for the 1974 broadcast season in 10 or more markets, as compiled and reported by the editors of Broadcasting.[32] They are as follows:

Access active. These are 28 syndicated programs sold in 10 or more markets for access time periods for the 1974 fall season, along with (in parentheses) the number of markets sold in all time periods. Asterisks denote barter shows.

Program	Distributor	Markets
*Animal World	Less Wallwork Assoc.	33 (79)
*Bobby Goldsboro Show	Show Biz Inc.	18 (128)
*Hee Haw!	Yongestreet	40 (126)
Hollywood Squares	Rhodes	50 (135)
Jeopardy	Metromedia Productions	16 (32)
*Jimmy Dean Show	Jimmy Dean Productions	10 (119)
*Lawrence Welk Show	Don Fedderson	41 (225)
Let's Make a Deal	Worldvision	47 (163)
*Lorne Greene's Last of the Wild	Y & R/Heritage	33 (37)
Masquerade Party	Fox TV	22 (22)
Name That Tune	Sandy Frank	46 (76)
New Candid Camera	Firestone	43 (105)
*Other People, Other Places	J. Walter Thompson	12 (82)
*Police Surgeon	Ted Bates	40 (110)
The Price Is Right	Viacom	49 (132)
The Protectors	ITC	14 (32)
Salty the Sea Lion	Fox TV	15 (15)
*Survival	J. Walter Thompson	14 (83)
To Tell The Truth	Firestone	22 (137)
Treasure Hunt	Sandy Frank	40 (70)
Truth or Consequences	Metromedia Producers	28 (157)
$25,000 Pyramid	Viacom	35 (58)
*Untamed World	Leo Burnett	45 (167)
*Wait 'Til Father Gets Home	Rhodes	28 (38)
What's My Line	Viacom	10 (69)
*Wild Kingdom	Bozell & Jacobs	48 (189)
Wild, Wild World of Animals	Time-Life	41 (101)
World At War	Gottlieb/Taffner	41 (48)

32/ Id., at 21.

CERTIFICATE OF SERVICE

I, Kenneth A. Cox, hereby certify that copies of the foregoing REPLY BRIEF FOR THE PETITIONER SANDY FRANK PROGRAM SALES, INC., were served this 3rd day of March, 1975, by mailing true copies thereof, by United States mail, postage prepaid, to the following parties:

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